IN THE MATTER OF THE HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON EDUCATION AND LABOR OF THE UNITED STATES SENATE PURSUANT TO SENATE RESOLUTION 37, AUTHORIZING THE APPOINTMENT OF A COMMITTEE TO MAKE AN INVESTIGATION OF CONDITIONS IN THE PAINT CREEK DISTRICT, WEST VIRGINIA

BRIEF OF GEORGE S. WALLACE FOR THE STATE OF WEST VIRGINIA, DEALING WITH THE FOURTH SECTION OF THE INVESTIGATION

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SENATE RESOLUTION NO. 37.

63rd CONGRESS

Resolved, that the Senate Committee on Education and Labor, is hereby authorized and directed to make a thorough and complete investigation of the conditions existing in the

Paint Creek District of West Virginia.

1. * * * * * * * * *
2. * * * * * * * * *
3. * * * * * * * * *

4. Investigate and report all facts and circumstances relative to the charge that citizens of the United States have been arrested, tried and convicted, contrary to or in violation of the Constitution or the laws of the United States.

5. * * * * * * * * *
6. * * * * * * * * *
7. * * * * * * * * *

Statement of Facts.

In May, 1912, a disagreement arose between certain mine operators and miners on Paint Creek and a strike was inaugurated which at once spread to the mines on Cabin Creek, a creek about three miles west and separated from Paint Creek by a range of mountains. The points of difference between these parties will not be discussed under this section.

About the time the strike started the miners and their sympathizers began to arm themselves with high power rifles—many of which were guns formerly used by the Italian and Swiss Armies and having become obsolete were sold and when purchased had bayonets with them.

The mine owners about the same time attempted to operate the mines and employed mine guards to protect their non-union employees and their property. Conflicts between these forces were numerous—the miner claiming the guards were the aggressors—the guards claiming they were acting within their rights—violence and lawlessness was the order of the day—shootings from the hills into mining camps were frequent.

A number of persons estimated at thirty were killed.

Persons living outside of the troubled district came in in large numbers and participated in the disorder.

Local authorities of Kanawha County did not preserve order or protect life and property.

On July 27, 1913, the Sheriff of Kanawha County represented to Governor Glasscock that the situation was beyond his control and asked for and was given a portion of the National Guard to assist in preserving order, and between that date and September 1st the entire guard of the State was sent into the disturbed district acting in aid of the Sheriff. The Governor called upon the local authorities to increase their efforts to get the situation in hand and especially asked that a Special Grand Jury be called to investigate numerous murders, assaults, etc., that had taken place—at the same time he issued a proclamation calling upon the people to desist in the lawlessness and return to their respective homes. No Grand Jury was called, the local authorities claiming as a reason therefor that by reason of the inflamed condition of the public mind it was useless, the Constitution requiring persons indicted to be tried in the County in which

the indictment is returned—the peace proclamation was ignored.

On August 30th at the mining town of Ronda on Cabin Creek trouble occurred, in which two men (one of whom was a Deputy Sheriff) were killed and one man wounded.

Governor Glasscock, having no power under the Constitution or law to force the local authorities to act, and apprehending further trouble, on September 2nd declared Martial Law.

Prior to this date the miners and their sympathizers held public meetings at various places within and without the proclaimed districts, excitement was at the highest pitch—the mine owners were bringing in non-union men and attempting to operate their mines under the protection of their own mine guards and conflict between them and Union Miners was only prevented by the presence of soldiers.

Upon the declaration of Martial Law Governor Glasscock caused every mine guard in the proclaimed district to be arrested, disarmed and sent out of said district and all arms of every kind and description to be taken from persons residing in said district with the result that 1872 guns of various sizes, six machine guns, 482 pistols, numberless black jacks and billies and 175,000 rounds of ammunition were gotten. Three mine guards were tried by the Military Authorities for offenses and were convicted and sentenced to imprisonment. Some miners who interfered with non-union workmen were also arrested, tried and convicted, comparative quiet was restored.

During this period it was agreed between the mine workers, mine owners and the Governor that some police protection in the proclaimed districts would be necessary when Martial Law was withdrawn and the miners agree-

ing that they only desired reputable persons to do the work—a list of persons was submitted to the Governor none of whom were former mine guards and some of whom were members of the National Guard—and by him submitted to the mine workers and no objections being made to these persons they were appointed special officers to act as watchmen. Martial Law was withdrawn. The new watchmen assisted by a small number of the National Guard were to police the territory.

Almost immediately disorder broke out anew, assaults were frequent and in some instances persons were killed.

On November 15th a second proclamation of Martial Law was made—troops sent back into the territory and persons active in the disorders arrested and tried by the Military authorities.

During this period Mays and Nance, who had been sentenced by the Military Authority, applied to the Supreme Court for a writ of Habeas Corpus contending that the declaration of Martial Law and the Governor's action thereunder was illegal. A return was made to the writ setting out in detail the facts; the writ was refused. About the middle of December the troops were withdrawn without withdrawing the Martial Law proclamation with the hope order would be maintained without the presence of troops. But disorder broke out anew. The Legislature was in session and before acting further Governor Glasscock called upon the leaders of both Houses for conference and they with full knowledge of the previous declaration of Martial Law and of his actions thereunder, were unanimously of the opinion that Martial Law should be proclaimed and law and order restored.

Thereupon the troops were again sent into the field under a third proclamation of Martial Law. A large number of persons who had participated in the Mucklow bat-

tle were arrested including some persons who lived outside of the State of West Virginia all of whom were held until order was finally restored. The trains carrying troops into the disturbed district found dynamite upon the track over which the troop train was to pass.

On March 4, 1913, Governor Glasscock's term expired. The efforts of Governor Hatfield, the incoming Governor, to restore law and order in the troubled district were effective and on April 8, 1913, a proposition settling all differences, submitted by him was accepted by the operators and the miners, and troubled conditions ended on that date.

Argument.

The foregoing resolution upon its face discloses, and the avowal of certain Senators of the United States in the debates preceding its adoption shows, that it is in its final analysis an attempt upon the part of the Senate of the United States to review a decision of the Supreme Court of West Virginia, which held such persons had not been tried and convicted contrary to the Constitution of the State of West Virginia or the Constitution of the United States. A reading of the resolution itself shows that the question, "is a case equivalent of assuming and actually assuming the character of a suit and the Supreme Court of the United States is and should be the final interpreter thereof."

The avowal of a distinguished member of the Sub-Committee:

> "The only question we are authorized to examine into in this resolution is, whether or not these men were arrested, tried and convicted, contrary to the Constitution of the United States."
> (Senator Borah, page 394 of the record.)

This seems to us conclusive that the question referred to is judicial. The State of West Virginia whose executive officers have been pilloried in the debates in the Senate preceding the adoption of this resolution, whose constitution at the same time was read and interpreted by distinguished Senators, respectfully suggests to the Senate of the United States that it recognizes in it no power or authority for the adoption of the resolution in its present form. It does share with the Senate of the United States and all of the good people of the United States an earnest desire that peace may be maintained within its borders and that the law be impartially administered. It asserts that its Executive in the few months immediately preceding the adoption of this resolution was facing not a theory, but a condition, that this condition was met by the State officers in a constitutional way, and that peace and order was restored prior to the passage of this resolution.

One of its Executives used war measures to an extent that did not extend to taking the life of a single individual and his successor, strengthened by his efforts and the decisions of the Supreme Court settling the question of Executive power, handled the situation by milder methods.

In addition to an attempt to review a decision of the Supreme Court of the State of West Virginia, the foregoing resolution is the putting on trial the Executive officers thereof.

The State of West Virginia will attempt respectfully to show:

(1) THAT THE SENATE OF THE UNITED STATES WAS WITHOUT CONSTITUTIONAL AUTHORITY TO ADOPT THE FOREGOING RESOLUTION.

(2) THAT THE ONLY FEDERAL QUESTION INVOLVED IN THE ACTION OF THE OFFICIALS OF THE STATE OF WEST VIRGINIA DURING THE RECENT INDUSTRIAL TROUBLES WAS WHETHER OR NOT, UNDER THE XIV AMENDMENT, PERSONS WERE DEPRIVED OF THEIR LIBERTY WITHOUT DUE PROCESS OF LAW;

(3) THE ADVERSE DECISION OF THE SUPREME COURT OF WEST VIRGINIA TO THAT CONTENTION WAS RIGHT, AS SHOWN BY HISTORY AND AN UNBROKEN LINE OF COURT DECISIONS IN THE UNITED STATES AND ENGLAND.

Discussing these questions in their order:

(1) THAT THE SENATE OF THE UNITED STATES WAS WITHOUT CONSTITUTIONAL AUTHORITY TO ADOPT THE FOREGOING RESOLUTION.

It has been our understanding that it was the purpose of the framers of the Constitution of the United States to organize a government, safe guarded with checks and balances and preserving as nearly as possible sovereign states and that "power exists in the United States only by delegation or grant from the States. The States are divested of power only by grant to the United States or by the prohibitions contained in the Constitution. Thus the States are seen to be the original sources of power." Notes on Government, etc. Minor.

An examination of the Constitution of the United States does not disclose in it any grant of power to the Senate of the United States, to pass upon judicial questions, save and except to try impeachments.

If an authority is needed for this statement:

"The Constitution declares that the judicial

> power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain. If what we have said of the division of the powers of the government among the three departments be sound, THIS IS EQUIVALENT TO A DECLARATION THAT NO JUDICIAL POWER IS VESTED IN THE CONGRESS, OR EITHER BRANCH OF IT, save in the cases specially enumerated to which we have referred. We do not, after what has been said, deem it necessary to discuss the proposition that if the investigation which that committee was directed to make, was one that was judicial in its character and which could only be properly and successfully met by a court of justice, and if it related to the one in which relief or redress could be only by a judicial proceeding, that the power attempted to be exercised was one conferred by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and that it is not restricted."
>
> *Kilbourn* v. *Thompson,* 103 U. S. 105, 26 L. Ed. 377.

Can there be any question that this resolution falls under the case just cited?

If there is, consider the statement of a distinguished Senator:

> "Mr. President, it is a very serious and solemn proceeding for the Senate of the United States to resolve itself into a grand jury for the purpose of passing upon the acts of a State of the Union, to the end that the supreme authority of the Constitution of the United States shall be enforced."
>
> Senator Root, page 1698, Congressional Record.

Recognizing the unusual ability of the distinguished

Senator, we submit this statement to show that he recognized this resolution as a judicial enquiry.

Realizing in this case that the Senate of the United States is the judge of its own powers upon this question and with the belief that it will see the justness of this contention, we submit:

> "That the only protection against usurpation * * * * by the general government is to be found in the patriotism, statemanship and integrity of the officials of the several departments of the United States Government, in the provisions of the Constitution, in the structure of the government, and in the constant inculcation of the preeminent importance of preserving unimpaired the dignity, rights and powers of the States in their sphere, as well as those of the United States in theirs."

(2) THE ONLY FEDERAL QUESTION INVOLVED IN THE ACTION OF THE OFFICIALS OF THE STATE OF WEST VIRGINIA DURING THE RECENT INDUSTRIAL TROUBLES, WAS WHETHER OR NOT UNDER THE XIV AMENDMENT, PERSONS WERE DEPRIVED OF THEIR LIBERTY, WITHOUT DUE PROCESS OF LAW.

We will submit:

Judicial decisions, History, State and Federal, show that their actions were within the legitimate powers of the State.

We assume that it will be conceded that prior to the XIV Amendment of the Constitution of the United States no Federal question would be involved in the action of the Executive of the State of West Virginia, in declaring Martial Law, and it is unnecessary to cite any authority to show that the adoption of the XIV Amendment has not the effect of making all of the provisions

contained in the first eight Amendments of the Federal Constitution operative in State Courts, on the ground that the fundamental rights protected by this amendment are by virtue of it (XIV Amendment) to be regarded as privileges or immunities of the citizens of the United States.

Hurtado v. *California,* 110 U. S. 516.

Maxwell v. *Dow,* 176 U. S. 581.

The sole question to be determined therefore is:

> "Has the State deprived any person of life, &c., without due process of law"?

What is "due process of law?"

There have been two views laid down by the Supreme Court of the United States, as to what was the true rule in deciding what was due process of law.

The first laid down by Mr. Justice Curtis in *Murray* vs. *Hoboken Land Company,* 18 Howard, decided in 1856, discussed the phrase, "Without due process of law" as follows:

> "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land' in Magna Charta."

In 1883 in the case of *Hurtado* v. *California* and again, in *Lowe* v. *Kansas,* 163 U. S. 81, in defining due process of law the Supreme Court said:

> "Whether the mode of proceeding prescribed by this State and followed in this case, was due process of law depends upon the question whether it was in substantial accord with the law and usage of England before the Declaration of Independence and in this country since it became a Nation, in similar cases."

Thus we have two separate interpretations of what is due process of law, under the XIV Amendment, one holding the view that any thing was due process of law that was due process of law under the Magna Charta, and the second, anything is due process of law that was due process of law at the time of the adoption of our Declaration of Independence in 1776.

How then stood the law of England under the first branch of this enquiry?

> "From times coeval with the very origin of our liberties there has come down to us the doctrine, that in time of rebellion the Crown might, for the restoration of peace, declare war, and exercise its severities, against rebels. This right or prerogative of the Crown was admitted, even by the authors of the great charter; at the very time they were affirmed and upheld, and it was indirectly, though distinctly recognized by the High Court of Parliament in a judicial decision, which declared its exercise illegal in time of peace."
>
> Finlason's Commentaries on Martial Law, Page 1.

English history shows that this right has been exercised from its earliest time, certainly until 1776, and

> "In the year 1225, history relates that when a turbulent knight named Matthews had seized his judges and imprisoned them in his castle, Henry III at once levied troops and made war upon him, and having captured his castle hanged the whole garrison (vide Matthew of Westminster). This was contrary to the terms of the Great Charter (nullus liber home destruatur, nec super cum ibimus, nec super cum mittimus, nisi per legale judicium, &c.,) the obvious meaning of the words 'nec super cum ibimus' being, we will not come upon him with an armed force, nor otherwise than by due course of law. And it was beyond all doubt contrary to common law, for Lord Coke and

Lord Chief Justice Rolle laid it down, and it is undoubted law, that if a rebel be taken, he must at common law be tried. Nevertheless, neither at the time, nor ever since, was the act declared illegal; and it is perhaps the earliest instance of martial law recorded in our history."

Finlason's Martial Law, page 74.

"It is true this power was declared by the petition of right to be illegal; but neither the authors of the petition, who continued to exercise it, nor the commentors upon it, such as Lord Hale, ever dreamt that its (Martial Law) exercise, for its proper purpose was abolished; and from that time to the present the most familiar text books there is an unbroken tradition of legal doctrine that Martial Law, under the Crown is absolute, as allowed by the law of England in time of rebellion."

Finlason's Martial Law, page 2 and cases there cited.

"To state, since the petition of right martial law has not been exercized in England, by virtue of prerogative is inaccurate for on the occasion of the Lord George Gordon riots the Crown declared the tumults rebellious and directed the military to act without the civil authority, and they did act * * * * * * not as at common law merely in resistance of prevention, but slaying the people wherever they found them assembled, which was war and unlawful at common law and though Lord Mansfield tried to persuade the House of Commons that this "was not Martial Law" they knew better and adjourned. And Mr. Hallam justly derides the notion as sophistical." *Id.*

After the settlement of the Colonies we find during the Revolutionary War, that General Washington, at Valley Forge, adopted Martial Law, to prevent supplies

being sent from the adjacent country into the City of Philadelphia.

Burke's History of Virginia, Vol. IV, page 261.

In Virginia, in 1780 the Bill of Rights, contained the following provision:

> "Section 8. That in all capital or criminal prosecutions a man has a right * * * * * * to a speedy trial by an impartial jury of twelve men of his vicinage without whose unanimous consent he can not be found guilty, nor can he be compelled to give evidence against himself that no man be deprived of his liberty except by the law of the land or the judgment of his peers."

In 1780 the Legislature passed an Act entitled:

> "An Act giving further powers to the Governor and Council and for other purposes."

This Act provided that Martial Law should be in effect within twenty miles of the lines of the armies, (either British or Continental), provided for the trial of civilians by a Military Commission, provided for the appointment of a Judge Advocate, and in the absence of competent persons among the military forces to act as Judge Advocate provided that the District Attorney should act.

Under this Act on the 18th day of June, 1781, we find that one, Fauntleroy Dye, was tried by a Military Commission, upon charges preferred by RICHARD HENRY LEE, ESQ., and that he was sentenced to be "confined in prison during the continuance of the present war, without bail or main prize."

At the same time and before the same Court we find one, Edward Wright, tried, convicted and given the same sentence. Afterwards on August 8, 1781, we find that one, the Rev. John Lyons, was tried by a Military Court

and sentenced to "five years inprisionment at such place as the Governor should designate."

A record of these trials can be found in the Calendar of State papers in the capital at Richmond, Virginia. They are still in manuscript form. The evidence under which these persons were convicted is set out at length and it shows that the offences for which they were tried were strictly civil as distinct from military offences. Attention is invited to the fact that Thomas Jefferson was Governor of Virginia at the time of the passage of this Act. Attention is further invited to the fact that, in that troublesome time, this act not only received the approval of Mr. Jefferson the Governor, but Mr. Henry, who was then a potent factor in the State, did not oppose it, but later on saw the importance of strengthening the Executive arm of the government and in the Legislature at Staunton, in 1781, seconded a certain resolution granting the executive greater powers and observing that he wanted "an officer armed with such powers as was necessary, &c."

See William Wirt Henry's Life of Patrick Henry, Vol. 2, page 148.

In February, 1787, the Legislature of Massachusetts by an act passed on February 4th of that year by Chapter 5 thereof, entitled "General Court's Declaration that a cruel and unnatural rebellion existed within this Commonwealth," etc., declared Martial Law in certain counties in which a rebellion was declared to exist, led by one Daniel Shay of Pelham.

Since the adoption of the Federal Constitution in 1787, the National Government and State Governors as well have repeatedly had occasion to declare and exercise Martial Law.

In 1842 the so-called Dorr Rebellion, the entire State of Rhode Island was declared under Martial Law. The

right of the State to declare Martial Law was submitted to the Supreme Court of the United States who in the course of its opinion said:

> "In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent nor under what circumstances that power may be exercised by a State. Unquestionably a Military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the laws of Rhode Island evidently contemplated no such government. It was intended merely for the crisis and to meet the peril into which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection too strong to be controlled by civil authority.
>
> "The power is essential to the existence of every government; essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government.
>
> "The State itself must determine what degree of force THE CRISIS DEMANDS. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State as to require the use of its miltary force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition."
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> *Luther* v. *Borden*, 7 Howard 1.

In 1899 the Governor of Idaho proclaimed Martial

Law within certain districts in his State, which action was sustained by its Supreme Court.

In re Boyle, 6 Idaho 609, 45 L. R. A. 382.

In 1903 the Governor of Pennsylvania ordered out the National Guard of that State to act in aid of civil authority. No proclamation of Martial Law was made. A soldier shot and killed a civilian, who violated a military order. A Coroner's Jury found that "the shot was hasty and unjustifiable" and recommended that the matter be placed in the hands of the District Attorney for investigation. The soldier was arrested by the Civil Authorities but was released upon habeas corpus by the Supreme Court, who in discussing the case said:

> "Order 39 was as said a declaration of qualified Martial Law, a qualification in that it was put in force only as to the preservation of public peace and order. Not for the ascertainment or vindication of private rights * * * * * for these the Court and other officers of the law were still open and no exigency required interference with their function but within the necessary field and for the accomplishment of its intended purpose it was Martial Law with all its powers. *The Government has and must have this power or perish.* And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.
>
> It is not infrequenqly said that the community must be either in a state of peace or war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life and yet a State of disorder, violence and danger in special directions, which though not technical war has in its limited field the same effect and important enough to call for Martial Law for suppression, is not distinguishable, so far as

the powers of the commanding officer are concerned, from actual war * * * * * * When the civil authority though in existence and operation for some purposes is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of a strong hand usually held in reserve and operating only its moral influence, but now brought into active exercise.

The Sheriff may retain command for he is the highest executive officer of the county and if he does so, ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the State the Governor intervenes as the Supreme executive and he or his military representative becomes the superior and commanding officer.

"The resort to the military arm of the government therefore means that the ordinary civil officers to preserve order are insufficient, and the rule of force under military methods is *substituted to whatever extent may be necessary in the discretion of the commanding officer.* The effect of martial law therefore is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order, for security of life and property are concerned there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self defense common to all countries, has established the rule that whatever force is necessary is also lawful."

Commonwealth v. *Shortall,* 266 Pa. 165, 55 Atlantic 952.

In 1905, the Governor of Colorado declared certain districts of that state in a state of insurrection and ar-

rested and imprisoned certain persons. At this writing Martial Law is in force in a section of Colorado.

The first declaration of Martial Law by Colorado came before the Supreme Court of the United States in the case of *Moyer* v. *Peabody,* 212 U. S. Reports, page 78, the Court held:

> "What is due process of law depends on circumstances and varying with the subject matter and the necessity of the circumstances."

And further held that there was no liability on the defendant for imprisoning the plaintiffs.

The Military Code of Georgia, section 1434, Vol. 2, Code of Georgia, 1910, as Amended in August 1912, * * * * *

> "Whenever any Judge of the Superior Court * * * * * shall have reasonable cause to apprehend the outbreak of any riot, rout, tumult, insurrection, mob * * * * * it shall forthwith become the duty of the judge, * * * * * to report the facts and circumstances to the Governor, and request him to order out such portion of the militia of the State as may be necessary to preserve the peace; and it thereupon shall be the duty of the Governor, if he deems such apprehension well founded, to order out * * * * * such portion of the militia of the State as he may deem advisable for the enforcement of the law, and when the Governor orders out troops * * * * * he shall thereupon by proclamation declare a state of insurrection in the locality in which the disorder is located; and if the Governor deems it advisable he may especially instruct the officer in the command of such troops as to duties required of them, and to direct their execution under the immediate control of the Governor."

Under this Act, in September, 1912, a portion of the Militia of Georgia was ordered out in the City of Augus-

ta, charged with the duty of restoring order and protecting property from mob violence, and three citizens were killed by the soldiers in the discharge of their duty.

The soldiers were tried and acquitted and the Governor in approving the finding, stated:

> "When soldiers are called upon by civil authorities, it is to be assumed that it is soldiers with soldier's weapons that are needed. These citizens met their death by refusing to obey the lawful orders of the Guards to halt, and, after repeated warnings, not to attempt to pass the lines had been given them by soldiers. Law and order in this commonwealth must be maintained.
>
> Joseph M. Brown, *Governor.*"

During the recent flood in the Ohio Valley, the Governor of Ohio declared Martial Law in Marietta, Dayton, Hamilton and perhaps some other cities along the river.

During the Civil War Mr. Lincoln repeatedly declared Martial Law. Numerous persons were tried and convicted by Military Commissions. In the District of Columbia Martial Law was in force from 1861 to 1865, including both years. The local Courts were permitted to and did perform certain functions, but persons charged with offenses that in the judgment of the Military Authorities should not be tried by the local courts, were tried before Military Commissions. The most notable instance was the trial of the persons who assassinated President Lincoln. In May, 1865, pardons were granted to all persons then serving sentences under conviction by Military Commission.

> Letters and Papers of the President's, Volume VI, page 331.

In 1888 during the time of the Chinese riots in Tacoma and Seattle, Washington, the territorial Governor

declared Martial Law. This action was put up to then President of the United States, Grover Cleveland, and it was approved.

See "Report of Governor of Washington Territory, to the Secretary of the interior, 1886."

Afterwards in 1894, during the railroad riot in Chicago, President Cleveland issued a proclamation warning all persons, who persisted in taking part with the riotious mob or interfering or resisting the execution of the laws of the United States, that they could not be regarded other than as public enemies. This proclamation was by intent and purpose a proclamation of war, and acting under it a regular officer in command of the troops, fired into the mobs in Chicago, and killed several.

In the Confederate States that had a Constitution similar to the one of the United States, whose President Jefferson Davis, Secretary of War Judah P. Benjamin, Assistant Secretary of war J. A. Campbell, were distinguished lawyers. Martial Law was declared, in 1862 in Norfolk, Richmond, and in the adjoining country for a distance of ten miles, and later on in different parts of the State of Virginia and other parts of the the Confederacy. These proclamation are found in Messages and Papers of the Confederacy, Vol. 1, page 219 &c., and they provide for the suspension of civil jurisdiction and the punishment of civilians for civil offenses by military authority.

As an authorty for the application or enforcement of martial law we have Washington, Jefferson, Henry, Lincoln, Jefferson Davis and Grover Cleveland, besides the Governors of several States.

In the debates pertaining to this resolution reference was made to the manner in which General Washington exercised military power in putting down the whiskey rebellion in western Pennsylvania.

It is respectfully suggested that it is not the question as to how power is used, that is under discussion, but the right to exercise the power. It is further suggested that Washington's action in putting down the so-called whiskey rebellion did not meet the approbation of all the persons in this country at that time, and we find Mr. Jefferson criticising General Washington's action in the suppression of this rebellion, in a speech in Congress. In December, 1794, he wrote Mr. Madison concerning it:

> "I expected to have seen some justification of arming one part of society against another, of declaring a civil war the moment before the meeting of the body which has the sole right of declaring war; of being so patient of the kicks and scoffs of our enemies, and rising at a feather against our friends."
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> Wm. W. Henry's Life of Patrick Henry, Vol. 2, page 533; Jefferson's Works, Vol. 4, page 112.

General Jackson was criticised for exercising Martial Law in New Orleans in 1815, and was actually fined by a Judge of one of the local courts for his action thereunder.

Mr. Lincoln was criticised for his action in declaring Martial Law and his action thereunder in the war between the states.

Grover Cleveland was criticised for his action in the railroad strikes in 1894.

Is it not generally conceded at this time that these distinguished men acted for the best interest of the Nation and within Constitutional limits?

History having shown that Martial Law has been declared by the Naton and States and actually enforced, we come now to the question:

(A) MAY A STATE DECLARE MARTIAL LAW?

(B) WHAT IS MARTIAL LAW AND WHAT IS

THE EFFECT OF A DECLARATION THEREOF—DOES IT IPSO FACTO SUSPEND THE CONSTITUTION AND LAWS OF THE STATE?

(C) WHAT IS THE POWER OF THE GOVERNOR UNDER MARTIAL LAW AND HIS RESPONSIBILITY THEREFOR?

(a) May a State Declare Martial Law?

The Supreme Court of the United States decided in the case of *Luther* v. *Borden,* 7 Howard, page 1, that the power to declare Martial Law is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government.

We look in vain to find a decision to the contrary. It is true that the great case of *Ex-Parte Milligan* has been read and quoted on the floor of the Senate and the speech by General Garfield has been printed and scattered broad cast as an authority against Martial Law—which we submit it is not—and besides "every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found therein are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

Applying this rule to the Milligan case and what have we? Milligan, a citizen of Indiana, outside of the theatre of military operations and in the face of an Act of Congress requiring that persons charged with offences such as the Supreme Court held that Milligan was charged with, be indicted and tried by a federal court, was tried and convicted by a military commission.

The court in deciding this case, decided what? The unanimous judgment of the court was that Miligan was

not amenable to trial by military commission. The Court divided upon the question of the source of Martial Law and when properly applicable the majority holding that Martial Law could not arise by reason of a threatened invasion but the invasion must be actual.

The minority through Chief Justice Chase, held, when the Nation was involved in war and some portions of the country were invaded, that it was within the power of Congress to determine in what States or Districts such imminent public danger existed as to justify the establishing of military tribunals for trials of crimes and offences.

The Milligan case was reviewed in the case of *Ex-parte D. F. Marais,* 1902, A. C. 109, and it was held by the English Court, that by reason of modern methods of conveyance and communications a threatened invasion was sufficient to warrant a declaration of Martial Law, and this was done in the Colonies in South Africa.

General Garfield's argument in the Milligan case resolved that case into three proporitions:

> 1. "That the Executive (meaning the President of the United States) has no authority to suspend the writ of habeas corpus, or to declare or administer Martial Law; much less has any military subordinate of the Executive such authority; but these high functions belong exclusively to the Supreme Legislative authority of the nation.
>
> 2. "That if, in the presence of great and sudden danger and under the pressure of overwhelming necessity, the Chief Executive should, without legislative warrant, suspend the writ of habeas corpus, or declare martial law, he must not look to the Courts for justification, but the Legislature for indemnification.
>
> 3. "That no such necessity can be pleaded to justify the trial of a civilian by a military tribu-

> nal, when the legally authorized civil courts are open and unobstructed."

Cannot these three propositions be admitted and yet have no application to the case in West Virginia?

Again, how did congress and the people of the United States interpret the decision in the Milligan case at the time it was rendered?

Did the Congress of the United States at that time construe the Court to hold in the Milligan case as stated by Justice Davis that:

> "The Constitution of the United States is a law for rulers and the people, equal in war and peace, and covers with the shield of its protection all classes of men at all times and under all circumstances?"

If so, why were the so-called "Reconstruction Acts" passed? Do we not know as a historical fact that after the decision in the Milligan case persons were tried by military commissions and punished thereunder; that the military commissions were organized under the authority of the federal government and that they were exercised against citizens of the United States. So it is safe to assume—if the reading of it did not show to the contrary—that the Milligan case did not decide what it is now claimed for it.

The Milligan Case does not either in words or effect overrule the decision of *Luther* v. *Borden*, which holds that a State can declare Martial Law. Can this be done in the State of West Virginia? We submit that it can.

Section 5, Article 7 of the Constitution (West Virginia) provides:

> "The Chief Executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed."

Section 12, further provides:

> "The Governor shall be commander-in-chief of the Military forces of the State, and may call out the same to execute the laws and suppress insurrection and repel invasion."

Section 92, Chapter 18 of the Code of West Virginia, provides:

> "In the event of invasion, insurrection, rebellion or riot, the Commander-in-Chief may, in his discretion, declare a state of war in the towns, cities, districts or counties where such disturbances exist."
>
> "When any portion of the miltary forces of this State shall be on duty * * * * * in time of war, insurrection or invasion * * * * * the rules and articles of war and the general regulations for the government of the army of the United States shall be considered in force and regarded a part of this Chapter."

This last statute removes any question as to whether the power to declare a state of war under our Constitution is vested in the legislative or executive departments by the action of the legislature vesting it in the executive in the act above set out.

Thus we see the Governor by the Constitution vested with the chief executive power of the State, charged with a duty of enforcing its laws, and given the power to declare a state of war to exist.

Do we find any limitations to the exercise of this right in the Federal Constitution? We confidently say no. This question as we view it is dependent upon the relations of the several States to the Federal Union. If the States upon the adoption of the Federal Constitution became a part of a consolidated government and all the war making powers were vested in the Federal gov-

ernment, then and in that event, the State can not declare a state of war to exist, or enforce any war power.

Article 1, of section 8, paragraph 11, is an inhibition upon the state to engage in war, "unless actually invaded or in such imminent danger thereof as not to admit of delay."

Is not this provision of the Constitution an expressed recognition of the rights of the states to preserve themselves? Does not the Constitution go even further than that and obligate the National Government when called upon by the State authorities for federal aid, to aid such State? Does not this show that it was the intention of the framers of the Constitution that each state should so far retain its sovereignty as to be able to protect itself from its foes from within or from without, without having to wait to call upon the power of the Federal government?

The Supreme Court of West Virginia has decided that the Governor has the right as an incident of the war power to declare Martial Law.

And this decision so far as it construes its own Constitution we submit is binding on this Senate.

> "Decisions of the State Courts in respect to the Constitution of their own States and law and in controversies not involving any federal question furnish the rule of decision in the Supreme Court in cases where they apply."
>
> *Province Inst.* v. *Massachusetts,* 6 Wallace 611.

(3) THE ADVERSE DECISION OF THE SUPREME COURT TO THAT CONTENTION *I. E.,* THAT PERSONS WERE NOT DEPRIVED OF THEIR LIBERTY WITHOUT DUE PROCESS OF LAW—WAS RIGHT AS SHOWN BY HISTORY AND AN UNBROKEN LINE OF COURT DECISIONS IN THE UNITED STATES AND ENGLAND.

We further assert that this decision of the Supreme Court of West Virginia, is sustained by every adjudicated case reported in the United States, except two, to-wit: *Ex Parte Moore* and *Ex Parte Kerr* from North Carolina and *Johnson* v. *Duncan,* from La. The cases sustaining follow:

> "Martial Law is restricted to and can exist only in those places which are the actual theatre of war, and their immediate vicinity, and it cannot be extended to remote districts or those not immediately connected with the operations of the contending army. If in time of civil war, the civil authorities of a district are able by ordinary process to preserve order and punish offences and compel obedience to the law, martial law does not exist there and the military commander has no jurisdiction; but, if owing to the disloyalty of the magistrates or the insurrectionary spirit of the people, the law cannot be enforced and order maintained, then martial law takes the place of civil law in such district, wherever there is sufficient military force to execute it.
>
> *In re Kemp,* 16 Wis. 383.

> "Martial law must be permitted to prevail in the actual theatre of military operations in time of war as an unavoidable necessity, but beyond the enforcement of martial law on the actual field of military operations, and its establishment in districts though remote from the seat of war, are yet so far in sympathy as to obstruct the administration of laws through the civil tribunal and renders a resort to the miltary powers a necessity as the only means of restraining disloyalty from overt acts and preserving the authority of the government, there seems to be no grounds upon which it can be properly exercised, a state of war does not suspend at once and everywhere the constitutional guarantees of the liberty of the citizen."

Johnson v. *Jones et als.,* 44 Ill. 142.

"When the courts of justice be open, and the judges, and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as it were shut up, *et silent inter leges arma,* then it is said to be time of war.

Griffin v. *Wilcox,* 21 Ind. 370.

"Martial law is limited to the theatre of actual military operations, when no civil authority remains and there is a necessity to furnish a substitute to preserve the safety of the army and society. A martial law rule can only prevail until the laws can have their free course."

McLaughlin v. *Greer,* 50 Miss. 453.

"When the necessity arises, the military power is paramount and the laws are silent—but war is an anomalous condition and when peace is restored or the necessity for military rule has ceased the supremacy of the laws is restored.

In the matter of Martin, 5 Barb. 153, Sup. Ct. N. Y.

In the case of *Luther* v. *Borden,* 7 Howard 1, the majority opinion recognized the right of a state to declare martial law, and in the opinion of Judge Woodbury, who dissented and who discusses at great length the constitutional guaranties and rights of the individuals, at page 83 of the opinion, he admits the right to declare martial law in the theatre of actual war, or of civil disorder in the following language:

"But in civil strife they are not to extend beyond the place where insurrection exists, nor to portions of the state removed from the scene of military operations."

In the Supreme Court of West Virginia, in the case of Mays and Nance, which was affirmed in the case of Mary Jones and others, is an elaborate opinion reviewing all of the authorities and holding that the Governor had the right to declare martial law.

Judge Robinson dissents (71 W. Va. pp. 527, 609) and cites as authority therefor, *Ex Parte Moore* and *Ex Parte Kerr,* 64 N. C. 807-816. We submit that this is the only case in the United States that holds that within the theatre of military operations, military powers are not supreme.

The dissenting opinion asserts two propositions:

1. THAT MARTIAL LAW CANNOT EXIST UNDER OUR CONSTITUTION, THAT IT IS A PART OF SELF DEFENSE, WHOLLY OUT OF HARMONY WITH CONSTITUTIONAL GOVERNMENT, AND THAT THE FRAMERS OF OUR CONSTITUTION PROHIBITED IT, RELYING UPON THE SAFETY VOUCHED TO THE STATE BY THE GENERAL GOVERNMENT, UNDER SECTION 4, ARTICLE 4, AND SECTION 3, ARTICLE 1.

2. THAT THE TEST OF IT BEING PERMITTED WAS THE LACK OF OPEN AND OPERATIVE COURTS.

The opinion of the majority of the court in the Mays-Nance cases and in the Jones-Boswell, and others case seems so entirely to answer this dissenting opinion that a further discussion is hardly in place.

However, discussing the first branch of this dissenting opinion, that Martial Law cannot exist, etc., aside from the rules of construction that are relied upon and cited in opinion of the majority, can it be conceived that a sovereign people intended such a construction to be placed upon their organic law, that in a crisis in the life of

their government it would be impotent to preserve itself?

Would this not be true if the construction urged by the dissenting opinion prevailed? Assume that the disorders that this record shows existed in Cabin Creek districts of Kanawha County had spread to adjoining counties,—which it was doing,—and the county authorities of adjoining counties were as impotent to deal with it as the Kanawha County authorities were, would it be contended that the Governor who is vested with the executive power of the State, with *the* power to declare a state of war to exist—charged by the Constitution with the duty of enforcing its laws,—is limited in the measures he can use in suppressing insurrections, to measures that have been demonstrated to be inadequate?

If this be so, what would be done? Would the rioting and anarchy be permitted to continue until the rioters saw fit to desist?

To ask the question is to answer it.

By Article 3, Section 2, Clause 3 of the Federal Constitution it is provided:

> "The trial of all crimes, except in cases of impeachment shall be by jury; and such trials shall be held in the State where the crimes shall have been committed."

Yet in the face of this provision the Supreme Court of United States held:

> "If all the inhabitants of a state, or even a great body of them should combine to obstruct interstate commerce or the transportation of mails prosecution for such offenses had in such a community would be doomed in advance to failure and if the certainty of such failure was known and the National Government had no other way to enforce the freedom of the Interstate Commerce and the

> transportation of mails than by prosecution and punishment for interference therewith the whole interest of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state but there is no such impotency in the National Government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care."
>
> *In re Debbs*, 158 U. S. 582-584.

Does not the reasoning in this case apply with peculiar force to the conditions shown by this record and may we ask, what becomes of the other provisions of the Constitution, particularly Section 17 of the Bill of Rights?

> "The Courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

The record shows that a number of persons were killed, others assaulted, property destroyed, telephone lines torn down and trains fired into, and that there was certainly no successful effort on the part of the civil authorities to prevent it. Have not the peaceable citizens of the State some rights under the Constitution? What must the Governor do? Call a Constitutional Convention and amend the organic law in the midst of civil disorders? This is the logic of the contention of the dissenting opinion.

Again, it is urged that the State relying upon the provision of the Federal Constitution guaranteeing it aid, &c., had purposely shorn itself of this sovereign power. This argument begs the question. When this provision was written in the Federal Constitution, the states were

all powerful and there was not a person who dreamed that the provision was adopted for any such purpose. On the contrary, Section 4, Article 4, provides that the Federal Government "shall protect states on application * * * * *against domestic violence.*"

Read this provision in connection with Section 3, Article 1. "No State shall * * * * engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

Do not these two provisions show that it was clearly reserved to the State the right to make war when actually invaded and put down domestice violence.

If this was not so, why did not Section 4, Article 4, guarantee protection against domestic violence irrespective of request? We can easily imagine a condition in which the Federal Government could not comply with the requirment of Section 4, Article 4.

In that event must the State Government fail and anarchy prevail by reason of such a construction of the Constitution contended for in the dissenting opinion?

If that construction is sound, would we not be face to face with the proposition:

> "It (Martial Law) cannot be dispensed with under all circumstances, and if there were a law prohibiting it, it would break through the law in cases of direct and absolute necessity. The salvation of a country is like the saving of an individual life—it is paramount to all else."
>
> Dr. Francis Lieber in a manuscript note to the "Instruction for the Government of armies of the United States in the field," found in War Department Document No. 79.

We submit that the construction contended for is contrary to the canons of interpretation and judicial de-

cisions and contrary to the experience and practice of our people and our traditions.

It is urged that the framers of this Constitution were familiar with the history immediately preceding the adoption of this Constitution in 1872, that they were familiar and had some experience with the persecution at the hands of the military authorities and that this Constitution was framed in the light of history and experience. This we grant but at the same time it is admitted that the framers of this Constitution were lawyers and men of ability. Most of them were Southern in their sympathy and entertained strong views upon state rights.

They were familiar with the principle of International Law:

> "The right to declare, apply and exercise Martial Law is one of the rights of sovereignty and is as essential to the existence of the State as is the right to declare and carry on war. It is one of the incidents of war and like the power to take human life in battle results directly and immediately from the fact that war legally existed. It is a power inherent in every government and must be recognized by all other government, but the question of the authority of any particular functionary to exercise this power is a matter to be determined by local and not international law."
>
> Halleck's International Law, Volume 1, page 508.

With the decision of their own Supreme Court:

> "That all Courts, from the Supreme to the most inferior are bound by International Law whenever its rules and principles apply to the cases to be adjudicated is a proposition that need not and I think cannot with success be controverted."
>
> *Caperton* v. *Martin,* 4 W. Va. 154.

With a thorough understanding of the decisions of the several Courts set out in the preceding pages, with the action of the Confederate Government under which some of them had served, with the decision in the Milligan case and with the interpretation that had been put upon it by the Acts of Congress thereafter, what then did they propose to do? Did they propose to divest this State of its chief incident of sovereignty and make it practically a province under a consolidated government, or did they intend to do what the Supreme Court of West Virginia has held they intended to do, have their Constitution construed in such a way that all the provisions thereof could be given force and effect, and put their disapproval upon the power contended for by the minority opinion in the Milligan case, e. g.

> "That it was within the power of Congress to determine in what States or Districts such imminent public danger existed as to justify the establishment of military tribunals for the trial of crimes and offenses" and martial law could not be exercised outside of the actual theatre of military operations."

Adopting this construction we have a construction that is in harmony with the canons of interpretation and all portions of the constitution can be given a meaning. Adopting the other contended for the opposite result is attained and in the time of insurrection or war we should have the anomaly of attempting to prosecute war by means of local courts and juries—the first to be effected by partisan feelings—a proceeding doomed in advance to failure with the only remedy a calling of a Constitutional Convention to save the State.

2. THAT THE TEST OF IT (MARTIAL LAW) BEING PERMITTED IS THE LACK OF OPEN AND OPERATIVE COURTS AND THAT THE

COURTS OF KANAWHA COUNTY WERE OPEN AND OPERATIVE.

This is a question of fact and the arguments in the United States Senate have been upon *the assumption that the Courts of Kanawha County were open and operative.*

How Stands the Record?

The record shows that the National Guard of the State of West Virginia were sent into the field on the 27th day of July, 1912, and reported to the Sheriff to aid him in the maintenance of law and order, and between that time and the second of September, 1912, the date of the proclamation of Martial Law, all of the military force of the State were in the field, acting under the Sheriff. Did they preserve order?

> Evidence of S. P. Smith, Sheriff.
>
> (Q) Did you feel, with the military under your control on September 1 and 2, you were able to cope with that situation and preserve order? (P. 420.)
>
> (A) Mr. Smith: Why, no. I realized that we could not preserve order there without Martial Law. (P. 420.)
>
> Evidence of S. B. Avis, Prosecuting Attorney of Kanawha County.
>
> (Q) State whether or not in your opinion the authorities in Kanawha County were in a position to or could cope with the situation and restore law and order. (P. 335.)
>
> Captain Avis: I did not think so and do not now think so, referring back to the time. (P. 335.)

(Q) I desire to ask you if soldiers had been put in the field to co-operate and assist the civil authorities in the execution of the law and for jury trials—whether or not convictions could have been had and whether or not by the assistance of the military in that regard the law could have been enforced by the civil courts? (P. 336.)

(A) I do not know that I can answer categorically. I think I can answer the question, however. The military authorities were put in there and had been in there for some time before the declaration of Martial Law. (P. 336.)

(Q.) They were assisting the civil authorities, as you understand it?

(A.) As I understand it. P. 336.

(Q.) Were they in that capacity able to enforce law and order? P. 336.

(A.) My information is that they were not. There seemed to be no cessation of hostilities. P. 336.

(Q.) Could the civil authorities cope with the situation and restore law and order by the co-operation of the military authorities acting under the direction of the civil authorities.

(A.) It is hard for me to answer that question. All I can say is that they did not succeed in doing so, and that the matter got worse. And I still say that in my opinion the civil authorities could not have handled the situation there. P. 336.

Were the Courts of Kanawha County Open and Operative?

Dissenting Opinion.
ROBINSON, JUDGE.

All at a time when the Criminal Courts of Kanawha county were open, able and with full jurisdiction to try the charges against them.

We know by the record of these cases, we know judicially that they could have been so tried. * * * The disturbances did not make it impossible to give them the course of trial, thus no necessity justified the course pursued. The civil courts that pertained to that part and to the whole of the county was far from the seat of riot and wholly unaffected in its powers for regular and orderly presentment and trial.

Evidence of Capt. S. B. Avis, Prosecuting Attorney.

Attorney General Lilly: As I understand, although the courts were in session and sitting here at Charleston, the county seat of Kanawha county, yet so far as the enforcement of the law in the strike district is concerned, their functions were paralyzed and inoperative?

Capt. Avis: I think it was utterly impossible for either miner or operator to have gotten such a trial as the Constitution guarantees him, because of the fact that I hardly know of a man that did not have preconceived opinions on that subject and had taken sides.

I SAW GOVERNOR GLASSCOCK AND TOLD HIM THAT IN MY OPINION A FAIR AND IMPARTIAL TRIAL COULD NOT BE HAD IN KANAWHA COUNTY AND THAT THE CIVIL AUTHORITIES COULD NOT COPE WITH THE SITUATION. (Page 338.)

Questions by Senator Borah:

In other words, you desire to convey to the sub-committee the belief that the community had taken sides either with the operators or with the miners?

Capt. Avis: I do.

Senator Borah: And that by reason of that feeling the civil authorities were unable to hold their courts and proceed under the ordinary rules of procedure?

Capt. Avis: That is true as relates to trials. As to performing other official functions there were other things which prevented it. (Page 339.)

Senator Borah: Did that include the entire community, in your judgment. (Page 339.)

Capt. Avis: I think it did, Senator, at that time. (Page 339).

Capt. Avis: But as I stated, Senator, I did not believe you could get either grand jurors or petit jurors some of the members of which, or a large percentage of the members of which, had not taken sides on the controversy, either on one side or the other. (Page 343).

Senator Borah: In your judgment the state was not in a position to get justice at all or to fairly present its evidence and have it fairly considered? (Page 344).

Capt. Avis: That is my position exactly. (Page 344).

Senator Borah: Assuming that your observations were correct as to the feeling, what the subcommittee would like to know is how you could determine whether a man could have a fair jury until that jury was sought to be impaneled and the question was tested whether or not men would come upon the jury and qualify? (Page 344).

CAPT. AVIS: THERE ARE SOME THINGS WE CAN FEEL, SENATOR; BUT IF YOU LIVED IN THE ATMOSPHERE THAT WE LIVED IN, IN KANAWHA COUNTY, LAST SUMMER, WHERE EVERYTHING WAS SURCHARGED WITH GATLING GUNS, AND PISTOLS, AND LARGE CROWDS CONGREGATING, AND INTENSE FEELING, YOU WOULD HAVE THOUGHT THERE WAS WAR ON HERE, AND SOMEWHAT IN THE SHAPE THAT GENERAL SHERMAN TERMED IT, MORE LIKE HELL; AND IF YOU CAN

GET JURIES UNDER THOSE CIRCUMSTANCES, THAT MIGHT BE POSSIBLE. (Page 344).

Senator Borah: But who is going to determine whether you can get that jury or not? (Page 345).

Capt. Avis: That calls for an argument, and I will not argue it, although I want to state again that in my opinion it was absolutely impossible. (Page 345).

Senator Borah: Do you mean to say that under that system of eliminating those disqualified that out of 87,000 men you could not get 12 men who would qualify? (Page 347).

Capt. Avis: Yes, (Page 347).

Questions by Colonel Wallace:

Do you recollect when you discussed with me how the grand jury was drawn, and I suggested some way that we might get rid of some of these infected people, to try it? (Page 349).

CAPT. AVIS: I DON'T RECALL THAT. I WANT TO SAY, COLONEL WALLACE, THAT I MADE IT TO YOU VERY STRONGLY. I DO NOT KNOW THE LANGUAGE OR WORDS, BUT MY RECOLLECTION IS I MADE IT TO YOU VERY STRONGLY IN MY OPINION THAT THE CIVIL AUTHORITIES AND JURIES COULD NOT HANDLE IT. NOT BECAUSE OF THE FACT THAT THEY WERE BIASED OR PREJUDICED. (Page 349).

Atty. General Lilly: In these

larger offences, what is your information as to the number of men who participated in them?

CAPT. AVIS: I DO NOT KNOW THAT I CAN SAY THAT I HAVE OFFICIAL INFORMATION AS TO THAT, BUT IT WAS STATED AT TIMES AS MANY AS A THOUSAND MEN WERE ENGAGED AND THOUSANDS OF SHOTS FIRED. TO WHAT EXTENT THAT IS SO I DO NOT KNOW.

F. C. Burdette, Assistant Prosecuting Attorney.

(Q.) Tell this committee whether or not there was reported to you any acts of lawlessness in the summer of 1912 in the Cabin Creek district in this county?

(A.) IT SEEMED THAT THERE WAS A GENERAL UPRISING, THE GUARDS UPON ONE SIDE, ARMED, AND THE MINERS UPON THE OTHER. P. 411.

You are the Frank C. Burdette who conferred with the Governor about a special grand jury in August, 1912?

Yes, sir. (Page 412.)

Did you at that time believe that a grand jury should be called to take care of the conditions in this county?

I was of the opinion that we could not accomplish much but I was willing to make the effort.

DO YOU BELIEVE THAT THE CIVIL AUTHORITIES OF KANAWHA COUNTY, IN AUG-

UST, 1912, WERE ABLE TO TAKE CARE OF THAT SITUATION IN THE CABIN CREEK DISTRICT.

WE WERE NOT. (Page 412.)

Did you know of any force, or any threat of violence to the court or any officer, that would prevent the ordinary procedure of the civil courts?

I know of no specific threats.

JUST A GENERAL UPRISING. P. 416.

W. E. Glasscock, Ex-Governor: On August 16th I issued a peace proclamation and on the same day sent the following telegram to Judge Black, of the Intermediate Court of this county and S. B. Avis, the prosecuting attorney of this County. This is the Telegram:

"On account of so many recent violations of law in Kanawha County and the imminent danger of further disturbances, I earnestly and most respectfully request you to convene a special grand jury at the earliest possible date to investigate such violations and cause a trial to be had on any indictment that may be returned as speedily as may be consistent with justice and a fair and impartial administration of law." Page 365.

Col. Wallace: At the time you sent the telegram to Judge Black and Mr. Avis to call the special grand jury, what information had you of felonious assaults or persons being killed in the district covered by Martial Law? Page 366.

Gov. Glasscock: Well, I had infor-

mation that a number of people had been killed, and nobody had been prosecuted, and both sides to the controversy had admitted to me that a practical reign of terror existed up there. Page 366.

Col. Wallace: What statement, if any, did the civil authorities make to you as to their ability to restore order there? Page 366.

GOV. GLASSCOCK: HE TOLD ME THAT HE DID NOT BELIEVE THAT IT WAS POSSIBLE TO HAVE A FAIR AND IMPARTIAL TRIAL OF THESE PEOPLE UNDER THE EXCITEMENT AND EXISTING CIRCUMSTANCES IN THE COURTS OF THIS COUNTY. (Page 366).

COL. WALLACE: DID HE MAKE ANY STATEMENT TO YOU ABOUT THE ABILITY TO PROCURE INDICTMENTS AGAINST PERSONS WHO WERE PARTIES TO THIS INDUSTRIAL CONTROVERSY? (Page 366).

GOV. GLASSCOCK: YES, SIR, THAT WAS DISCUSSED AND INSTANCES WERE GIVEN WHERE MEN HAD BEEN SUMMONED TO COURT FOR THE PURPOSE OF INDICTING THESE PEOPLE UPON INFORMATION THAT THEY HAD, AND THAT THE RESULT OF THE EFFORT WAS THE INDICTMENT OF THE WITNESSES WHO CAME BEFORE THE GRAND JURY. (Page 366).

Col. Wallace: I will ask you to tell

the sub-committee whether or not there was ever a special grand jury that you know of called by Judge Black in response to that request? (Page 366).

Gov. Glasscock: There was not. (Page 366.)

SEN. BORAH: NOW, GOVERNOR, DID YOU HAVE ANY EVIDENCE BEFORE YOU OTHER THAN THE OPINION OF THE JUDGE AND THE OPINION OF THE PROSECUTING ATTORNEY, THAT YOU COULD NOT GET A FAIR AND IMPARTIAL JURY TO TRY THESE CASES? (Page 370).

GOV. GLASSCOCK: I DID. I HAD THE OPINION OF THE MINERS UP THERE ON THE ONE SIDE AND THE OPERATORS ON THE OTHER SIDE AND THE FACT THAT AT LEAST IN MY JUDGMENT 25 OR 30 MURDERS HAD BEEN COMMITTED AND NOTHING DONE. (Page 370).

Sen. Borah: I want to know why nothing was done. The Grand Jury had not been convened; nobody knew whether a grand jury would indict or not until the matter was submitted to them; therefore I infer indictc or not until the matter was that the matter was based upon the opinion of the Judge and the prosecuting officer, rather than an actual attempt to secure a grand jury and an actual demonstration that it would not indict? (Page 370).

Gov. Glasscock: Well, you are en-

tirely logical, Senator, in your judgment of the case. At the same time, these things had been going on not only for these months during which this strike had taken place, but for months before that, and nothing had been done. NOW, MINERS WERE COMING TO ME AND COMPLAINING THAT THEY COULD NOT GET JUSTICE IN THAT TERRITORY. THEY TOLD ME OF THE OUTRAGES THAT HAD BEEN COMMITTED UPON THEM AND NOTHING DONE. THE OPERATORS, ON THE OTHER HAND, WERE COMPLAINING OF THINGS THAT HAD BEEN DONE AND THEY HAD NO REDRESS. AND I KNEW THAT MURDERS WERE BEING COMMITTED AND NO PROSECUTIONS WERE BEING HAD, AND TO MY MIND THAT WAS ABOUT AS CONVINCING AS ANYTHING COULD BE THAT IF THE COURTS OF THIS COUNTY WERE OPEN TO THESE PEOPLE THEY WERE NOT OPEN TO ANY PURPOSE, OR AT LEAST THE GUILTY PEOPLE, WHOEVER THEY WERE, WERE NOT BEING PROSECUTED; and I want to be understood here as saying that I do not believe for a minute that all these offenses were being committed by one side at all, because if I understand the situation, pitched battles were being fought and both sides were to blame, and it was not a question of prosecuting one side;

it was a question of prosecuting whoever might be guilty, regardless of which side he was on. Page 370.

SEN. BORAH: DID THE MINERS REQUEST YOU TO DECLARE MARTIAL LAW? Page 372.

GOV. GLASSCOCK: THEY DID REPEATEDLY AND ON VARIOUS OCCASIONS. Page 372.

Sen. Borah: The reign of terror to which you referred a few minutes ago, prior to the time you declared martial law, seems to have been initiated by the mine guards? Page 373.

Gov. Glasscock: No: I could not say that. I don't think that would be a fair statement. It was contended by the miners that was so. On the other hand the mine guards were complaining that these miners were continually shooting into them; that they had to protect themselves against the miners. Page 373.

SEN. BORAH: IN OTHER WORDS YOU WENT INTO THE TERRITORY OF THIS STATE AND FOUND IN PRACTICAL CONTROL OF THAT TERRITORY THIS DETECTIVE AGENCY, WITH THESE OPERATING GUNS OR MACHINE GUNS AND OTHER ARMS, AND THAT YOU FELT COMPELLED TO DECLARE MARTIAL LAW IN ORDER TO GET RID OF THAT SITUATION? Page 392.

GOV. GLASSCOCK: WELL

THAT DON'T STATE THE WHOLE QUESTION. I DID FIND THOSE PEOPLE THERE, AND I DID HAVE A PURPOSE TO GET RID OF THEM AND, ON THE OTHER HAND, THE MINERS WERE CONTENDING WITH THEM FOR SUPREMACY, AND I THOUGHT THE STATE OF WEST VIRGINIA OUGHT TO BE IN CONTROL OF THAT SITUATION, AND I DECLARED MARTIAL LAW AND TOOK CHARGE OF IT MYSELF. Page 392.

SENATOR SHIELDS: HOW MANY ARMS WERE TAKEN UP, BOTH FROM THE GUARDS AND THE MINERS?

GOV. GLASSOCK: MY RECOLLECTION IS ABOUT BETWEEN 1,800 AND 1,900 GUNS; SOMETHING LIKE 450 REVOLVERS, 6 MACHINE GUNS AND IN THE NEIGHBORHOOD OF 175,000 ROUNDS OF AMMUNITION, NUMEROUS BLACK JACKS, BILLIES &C.,—SEE PICTURE FILED IN THE RECORD— Page 393.

COL. WALLACE: WHAT WERE THE FACTS THAT CAUSED THE DECLARATION OF MARTIAL LAW IN THE SECOND INSTANCE?

GOV. GLASSCOCK: THAT WAS NOT ONLY THE KILLING OF PEOPLE BUT THEY HAD FIRED UPON TRAINS THERE CONTAINING UNITED STATES MAIL. 394.

A reading of this evidence in cold print after the excitement of the time is passed, we submit shows that the courts of Kanawha County were not open and operative.

True the doors of the courts were not obstructed by armed rioters. True the courts were meeting and for some purposes performing their functions, but will it be contended that Article 3, of Section 17 of the Constitution of West Virginia:

> "The Courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay,"

was in force in the disturbed districts?

Will it be contended that this provision of our Constitution is to be of no force or effect, because a large number of persons engaged in an industrial controversy were resorting to violence and taking life, destroying property at will, that the Governor who is charged under the Constitution with the enforcement of law and given the executive power of the State, must stand by and permit this to go on, upon the theory that impotent courts were technically open?

This is not the first time that this claim has been urged. It will be remembered that during the strikes in Chicago in 1894, railroad trains were obstructed, railroad property destroyed, persons killed, mails delayed and after the President of the United States had been called upon by the United States Judge, United States Attorney and Marshal for assistance, the Governor of Illinois, by letter of July, 1894, addressed to the Honorable Grover Cleveland, President of the United States, protested against the sending of federal troops into the State and contended "that the local government was ready to fur-

nish any assistance needed, and amply able to enforce the law."

Again, in the City of Indianapolis from the first to the seventh of October, 1913, a condition bordering on anarchy existed. Something like eight persons were killed and the local authorities made absolutely no effort to control it. In fact, the papers reported that police officers refused to protect life and property and turned in their badges to their superior officers. The badges were returned to these officers with the statement that they would not be punished for failure to do their duty. While this condition existed the Governor sent his troops to Indianapolis to quiet the situation and before the troops were used order was restored. What steps he intended to take, we do not know, but we do know that at that time representations were made to the Governor that no necessity existed for executive interference, and we further know that the persons who made the representations, asserted that local officers had not exhausted their efforts,—they might have truthfully said they were not going to exhaust their efforts—and in addition to this, they sent an appeal to the Senators of the United States from Indiana, urging them to prevail upon the Governor not to interfere. What was meant by this? Is the Senate of the United States no longer the conservative branch of the Legislative department of a great government, or have the Senators become apostles of disorder?

Did not the condition that prevailed in the City of Indianapolis demonstrate that courts can be physically open and yet not performing their functions?

This we contend was true in Cabin Creek District of Kanawha County, West Virginia, and the Governor was right in declaring Martial Law.

As an authority for this, Lord Coke in the first Institute, treating of descents, says:

"First, it is necessary to be known what shall be said in time of peace, *tempus pacis,* and what shall be said *tempus belli sive kuerrae,* times of war. And so it was adjudged in the case of Roger Mortimer and of Thomas, Earl of Lancaster." * * * And therefore, when the Courts of Justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. SO WHEN BY INVASION, INSURRECTION, REBELLIONS OR SUCH LIKE, THE PEACEABLE COURSE OF JUSTICE IS DISTURBED AND STOPPED, SO AS THE COURTS OF JUSTICE BE AS IT WERE SHUT UP, *ET SILENT LEGES INTER ARMA.* THEN IT IS SAID TO BE TIME OF WAR."

Approved in Wheaton's International Law page 525.

"It constitutes a state of war, putting a stop to the ordinary course of justice, and depriving the subject of its protection; and cannot otherwise be subdued. And hence, of course, it would follow and is in effect laid down, that Martial Law, which is simply the law of war, is applicable to those engaged in war."

Finlason's Commentaries page 80.

"There may be peace for all ordinary purposes of life and yet a state of disorder, violence and danger in special directions, which though not technical war has in its limited field the same effect and important enough to call for Martial Law for suppression, is not distinguishable so far as the powers of commanding officers are concerned from actual war. * * * WHEN THE CIVIL AUTHORITY THOUGH IN EXISTENCE AND OPERATION FOR SOME REASON IS YET UNABLE TO PRESERVE THE PUBLIC ORDER AND RESORTS TO MILITARY AID THIS NECESSARILY MEANS

THE SUPREMACY OF ACTUAL FORCE. * * * SO FAR AS THIS POWER FOR THE PRESERVATION OF ORDER, FOR SECURITY OF LIFE AND PROPERTY IS CONCERNED THERE IS NO LIMIT BUT THE NECESSITY AND EXIGENCY OF THE SITUATION. AND IN THIS RESPECT THERE IS NO DIFFERENCE BETWEEN PUBLIC WAR AND DOMESTIC INSURRECTION. WHAT HAS BEEN CALLED THE PARAMOUNT LAW OF SELF DEFENCE IN ALL COUNTRIES HAS ESTABLISHED THE RULE THAT WHATEVER FORCE IS NECESSARY IS ALSO LAWFUL."

See *Commonwealth* v. *Shortall,* 266 Penn., *supra.*

Referring again to the record, it discloses that 1872 guns of various sizes were taken up, six machine guns, 482 pistols and 163,300 rounds of ammunition, (See page 80 of the Record), and that it was estimated that more than 36,000 shots had been fired within the territory, and as many as thirty persons killed.

We submit under all the authorities this is meeting the requirements that there were not open courts.

(b) What is Martial Law and what is the effect of a declaration thereof? Does it ipso facto suspend the Constitution and laws of the State?

"Martial law is the law that depends upon the just and arbitrary power of the King in time of war for in war by reason of the great danger arising from small occasions he uses absolute power."

Smith, Rep. Ang., Lib. II C. 3, cited in Blounts Law Dictionary and in Cowells Edition, 1670.

"Martial Law is an arbitrary law originating in emergencies, regulated by the expediency of the moment and extending to all the inhabitants of a place and country."

Dr. Worcestor's Dictionary, title "Martial."

"Martial Law is the suspension of civil jurisdiction." Hallem's Constitutional History Volume 1, page 240.

"Martial Law is the application of martial government—the government of force—to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government in all respects, when the latter would impair the efficiency of military law or military action."

Benet, page 4.

"What is called a declaration of Martial Law is the mere announcement of a fact; it does not and cannot create that fact. The exigencies which, in any particular place, justify the taking of human life without the interposition of the civil tribunals, and without the authority of the Civil law, may justify the suspension of the power of such tribunals and the substitution of Martial Law. The law of war, or at least many of its rules, are merely the results of a paramount necessity."

Halleck's International Law, page 599.

"Martial Law is defined as Military Power exercised according to the rules and usages of war. Martial Law at home or as a fact, is a military power exercised in time of war, insurrection or rebellion in portions of the country retaining their allegiance, and over persons and things not ordinarily subject to it."

Memo submitted by Leiber, Judge Advocate General, &c., U. S. A., War Department Document C 83-83.

"Martial law is the law of military necessity in the actual presence of war. It is administered by the General of the Army and is in fact his will. Of necessity it is arbitrary, but it must be obeyed.

> New Orleans was at this time the theatre of the most active and important military operations. The civil authority was overthrown. General Butler, in command, was the military ruler. His will was law and necessarily so."
>
> *United States* v. *Dickelman,* 78 U. S. 520.

> "Martial law is the temporary government and control by military authority of territory in which, by reason of war or public disturbance, the civil government is inadequate to the preservation of order and the enforcement of law."
>
> 40 Cyc. 387.

Thus we have the earliest and the latest definition of martial law.

Dicey in "The Law of the Constitution"—England, says:

> "The existence of martial law does not in any way depend upon the proclamation of martial law."

IN OTHER WORDS, THE PROCLAMATION OF MARTIAL LAW IS NOTHING MORE OR LESS THAN THE RECOGNITION OF A CONDITION THAT EXISTS IN THE PARTICULAR COMMUNITY AND THE PROCLAMATION IS FOR THE PURPOSE OF NOTIFYING THE INHABITANTS OF THAT PARTICULAR DISTRICT, THAT THE GOVERNOR HAS RECOGNIZED THE CONDITION TO EXIST AND WILL ADOPT WAR MEASURES THEREIN.

If these definitions of martial law are correct, and we respectfully submit that they are, and if we have further shown that the Governor has a right under the law to declare martial law, the question then presents itself to the Governor, how shall martial law be enforced?

We should not lose sight of the fact that Martial Law

does not pretend to proceed upon the theory of the common law, but resolves itself into a question, what is or is not military measures and especially deterrent measures used *interrorem* for the purposes of restoring peace.. Whether or not some other person may not have gotten results in a different manner is not the enquiry.

(c) What is the power of the Governor under Martial Law and his responsibility therefor?

It will be seen from the foregoing definitions and authorities that the power of the Governor as Commander in Chief of the Military forces IS ABSOLUTE UNDER MARTIAL LAW.

What was the task that confronted him?

It should be borne in mind that for six weeks he had his troops in the field acting as *armed policemen* in aid of the Sheriff with no results.

That he had published a peace proclamation;

He had requested the Judge and Prosecuting Attorney of the County to call a special grand jury to see if its action would not restore order and had been advised by these officers that to convene a special grand jury would be useles s and they either refused or did not act—disorder continued and in fact grew worse. If the record is to be believed both sides to the industrial war raging in this district were ready and willing to fight to the death. The record shows that enough arms were taken up in this small territory at the time of the first proclamation of Martial Law to arm a regiment including 6 machine guns and it is reasonably certain that all of the arms were not gotten. The record shows that persons living outside of the disturbed district marched in there armed and ready for battle, that pitched battles were fought and many persons killed. The mine owner

justifies his employment of armed guards on the ground that he was protecting his property, that he knew of the desperate determination of the men who were opposing him and as an authority therefor, relied upon a speech made by one McDonald a representative of the mine-workers at Cleveland in a joint conference between the coal operators and representatives of the mineworkers in States outside of West Virginia in which McDonald is quoted as saying:

> "We have had thousands of men go to the penitentiary for trying to establish our organization in West Virginia * * * * * * and not only have they gone to the penitentiary but they have been beaten up and slaughtered. * * * * * * We have men going to jail, we expect that more of us will go to jail. The penitentiary doors have no terror for us, as far as that is concerned, if putting two or three hundred men in jail will organize West Virginia we will send two or three hundred down." (See page 1982 Record.)

We are not interested as to the truth or falsity of this statement except that it is known that the operator asserted that this was a fact and with an equal determination employed armed guards to protect his property and employees. The record discloses stubborn and bitter contest between these forces. This is shown by the fact that there were three different proclamations of Martial Law and in the interim between each period of Martial Law violence broke out.

THE GOVERNOR'S TASK WAS HOW TO HANDLE THIS SITUATION AND RESTORE THE SUPREMACY OF THE CONSTITUTION AND LAWS OF THE STATE OF WEST VIRGINIA. Men have before and since been shot down under less aggravated conditions and such action has been justified under the usages and customs of war—were not extreme measures

warranted? The Governor's decision was to arrest and try persons who had been and were engaged in this lawlessness and try them by military commission with the hope that the promptness and severity of sentences imposed would have the effect of deterring others and restoring peace. This action being decided upon, the question was—were trials before military commission in accordance with the usages and customs of war? Reference to the Text Books, Court Decisions and Acts of Congress show that they are.

Military Commissions are said to be "simple instrumentalities for the more effectual execution of the war powers."

Hares American Constitutional Law, Vol. 2, page 979.

> "Their (Military Commission) authority is derived from the laws of war and their competency has been recognized not only in Acts of Congress, but in Executive Proclamations, in ruling of Courts and in the opinions of the Attorneys General. During the Civil War they were employed in several thousand cases; and more recently they were resorted to under the Reconstruction Acts of 1867."
>
> Howland's Digest of Opinion of Judge Advocate General &c., page 1066 and cases there cited.

This determination has been subjected to two criticisms:

(A) THAT THE CONTEST RAGING IN THIS DISTRICT WAS NOT *BIG ENOUGH TO JUSTIFY WAR MEASURES* CONCEDING THE GOVERNOR HAD THE POWER.

(B) THAT THE POWER CLAIMED BY THE GOVERNOR WAS DESPOTIC AND CAN BE ABUSED.

(A) That the Contest Raging in this District was not Big Enough to Justify War Measures Conceding the Governor Had the Power.

It is submitted that this question is not a judicial question but one addresed to the proper political department of a State or Nation and whose judgment in that particular is conclusive. It will be remembered that during the Civil War, after Mr. Lincoln had declared a blockade of the southern ports, certain cases known as "prize cases" reported in the 2nd Black, 635 came before the Supreme Court, the questions as to blockade, violation of blockade and the President's right to institute a blockade and what constituted sufficient evidence of a Presidential proclamation were discussed at length. The claimants of the vessel denying that they were liable to capture and denying the right of the government to exercise war powers and as stated by Mr. Richard H. Dana, Jr., one of the Counsel for the government, in a letter of March 9, 1863 "deny that this can be in point of law, a war. So the judiciary is actually after a war of twenty-three months duration to decide whether the government has the legal capacity to exercise these powers." The Court held: "The proclamation of a blockade by the President is of itself conclusive evidence that a state of war existed, which demanded and authorized recourse to such a measure."

It is further submitted that it is a settled legal principle that "the Executive being a co-ordinate branch of our government that any power, whether inherent or granted him by the Constitution or Legislative action is not reviewable by any other department of the government."

Ex-parte Moore and Ex-parte Kerr, 64 N. C. 807.

In re Moyer, 36 Col. 160 and *Martin* v. *Mott,* 12 Wheaton 19.

Mr. Justice Story in discussing this power, pages 29 and 30 of the last decision, uses the following language:

> "The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the military into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined in cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises: By whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object."

(B) That the Power Claimed by the Governor Was Despotic and Can be Abused.

True, any power can be abused and how power is used is always a political question—the fellow who doesn't

use it criticizes the one who does. Granting for the purpose of this case that the Governor's power has been abused, what is the proper tribunal to protect, guard against or punish this abuse? We submit not the legislative branch of the Federal Government.

Or to state it differently, what would a finding adversely upon the action of the Governor of the State of West Virginia lead to?

Would such a finding or a resolution by the Senate of the United States be authority in the Courts of West Virginia in each of the civil suits now pending against the Governor for his action under the martial law? If these cases perchance get into the Supreme Court of the United States, where doubtless they will, can this report or finding of the Senate be used in that Court? We submit not. The framers of the Constitution of West Virginia have provided a way to hold their Executive responsible for any usurpation of abuse of power, and that is by impeachment. In fact, the case of *Ex-parte Moore,* decided by the Supreme Court of North Carolina, a case the Governor declared a state of war to exist in Caswell and Alamance counties, and sent his militia there to take charge. The Chief Justice of the Supreme Court issued a writ of habeas corpus requiring the Governor to turn over or release certain persons held as military prisoners; the Governor made a return thereto, showing his declaration that a state of war existed. The Supreme Court of North Carolina held, that they could not go behind the finding of the Governor, that a state of war existed in those particular localities, but contended that the arrest and detention of petitioners although it might be necessary to suppress the insurrection was not the proper means, as it violated the declaration of rights.—It is submitted that this decision is directly in conflict with *In re Boyle,* 6 Idaho 609, 45 L. R.

A., 382, *Moyer* v. *Peabody,* 212 U. S. 161,—and granted the writ ordering the release of the petitioners, which the Governor declined to do.

The Court admitted its inability to enforce this order. When the Legislature met the Governor was impeached, not for declaring a state of war, not for enforcing martial law, but for improper enlistment of persons in the militia of the State and not obeying the writ of the court.

What Was the Action in West Virginia?

The Writ of Habeas Corpus was not suspended. Upon the contrary the Governor made a return to the writ in each of the cases setting up the conditions in the disaffected district and his action thereunder and after a full hearing thereon, the Supreme Court refused the writ and remanded the prisoners.

Can it be contended that this was irresponsible government? What other facts are disclosed by the record in this case?

Martial Law was declared on September 2, 1912; again, on November 15, 1912, and the case in re Mays and Nance reported in 71 W. Va. 419, was decided December 17, 1912. At the regular session of the Legislature that convened in January, 1913, the Governor reported his action to this body. In February, 1913, disorder broke out again and the civil authorities admitted their inability to meet the situation. The Governor then called into his conference leaders of both Houses of the Legislature irrespective of party, (page 397 of the Record) discussed the matter with them, and they were a unit in advising a third declaration of Martial Law. The Legislature at that time was fully advised of the Governor's action under the former declarations of Martial Law, the Supreme Court's decision sustaining his ac-

tions, and as an evidence of how they regarded it, the following resolution, introduced by a member of opposite political faith to the Governor, was unanimously adopted by the lower House:

> "Whereas it is commonly reported and accepted as true that a deplorable state of lawlessness and practical anarchy exists in the Paint creek and Cabin creek districts of the County of Kanawha, a number of persons having been killed there within the past few days, and a state of terror having been created in those districts, thereby casting a blot on the fair name of our State, and of her liberty loving, law abiding people, and causing great expense to the State:
>
> Therefore, be it Resolved, by the House of Delegates, the Senate concurring therein, that this Legislature, representing the people of West Virginia, deplore such a condition of affairs and condemn in the strongest terms such acts of violence, as well as those who are engaged in bringing about such a state of terror and lawlessness, and it is the sense of this Legislature that the Governor of this State should use all necessary means that may be at his command to restore order, maintain the supremacy of the law, and adequately punish those who have participated in such lawlessness and anarchy;
>
> And, we, the Representatives of the people, pledge our support to the Governor of this State in the use of all necessary means to restore order and to command the respect for the law in those districts."

In view of the foregoing, can it be consistently urged that there was any abuse of power on the part of the Executive? But the contrary, does not the record show, that, clothed with the great war power of the State, he restored and maintained order in the disturbed district and that the sum total of his offence is the fact that he

arrested, tried and confined in the penitentiary for a period of less than sixty days persons who had been active in the disorders? Is not the situation fairly summed up by the Washington Post, in its issue of June 15, 1913?

> "The West Virginia strike probers have made short work of the job which at one time threatened to engross their attention for a month or more. Something like a plan of campaign was mapped out which contemplated an exhaustive inquiry, but once the committee got on the ground it was found that the subject of inquiry had been overestimated in some respects, and that as regards the conspiracy charge its function had been superseded by the Federal court. Moreover, everybody involved in the strike was inclined to make a clean breast of his participations in the acts under scrutiny, a fact which greatly facilitated the proceedings.
>
> The State officials pleaded justification for resorting to Martial Law, showed that the "Inhuman" drum head courtmartial sentences had not been carried out, and that in other respects they had been maligned in the complaints made to Congress, the serious charge of peonage appears to have had no foundation. Striking miners testified to rigorous measures employed by the State authorities in handling the situation, and their testimony was measurably confirmed, but the horrors depicted by the Socialist delegation sent to Washington could not be verified.
>
> This had been the experience of Debs and Berger, whose investigation preceded that of the Senate committee, and which has resulted in a voluntary statement to Governor Hatfield that they had found conditions in the strike district very different from what had been pictured by their informants.
>
> That imported mine guards and imported strike leaders fought pitched battles and defied the local

> authorities, and that appeals for troops and court martial decree were resorted to, are admissions on which is based the charge and 'arrest and conviction of citizens contrary to the law and Constitution.' Much of the testimony drawn out at the hearing in Charleston related to that branch of the inquiry, and probably the report of the committee will treat mainly of that feature, with a view of determining what legislation, if any, ought to be set on foot to guard against a repetition of the disturbance.
>
> Viewed from any angle, the strike and its complications present an ugly aspect, but it is comforting to see that although the provocation was great there was no such abuse of authority as those who felt the halter draw would have the world to believe.''

It is further interesting to know that some of the persons who were deprived "of their rights under the Constitution of the United States" by the authorities of West Virginia, if newspaper reports are to be believed, are being deprived of the same rights by the authorities of the State of Colorado.

And still others of the same crowd are appealing to the Senate to investigate strikes in Colorado and Michigan and to prevent Executive interference at Indianapolis.

Verily have the peaceful citizens of the community no rights under the Constitution and must all the provisions of the Constitution including Section 17, Article 3, give way to insure to hired law breakers the benefit of the provisions of Section 14, Article 3?

In conclusion it is respectfully submitted that the State of West Virginia by the adoption of this resolution was subjected to an indignity unwarranted by constitutional right, and although recognizing that fact it has notwithstanding in every way assisted the sub-com-

mittee of the Senate in its investigation with the belief that the high character and the ability of the gentlemen who compose it is a sufficient guaranty that no report will be made at variance with the principles herein contended for.

GEORGE S. WALLACE,
For the State of West Virginia.